

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

IA NO: CAN/1/2023

WPA/16495/2023

Indane LPG Distributors Association, West Bengal

-Vs-

Indian Oil Corporation Ltd. & Ors.

With

IA NO: CAN/1/2023

WPA/16797/2023

Indane LPG Distributors Association, rep. by its

Authorized Signatory Bijan Behari Biswas

-Vs-

Indian Oil Corporation Ltd. & Ors.

With

IA NO: CAN/1/2023

WPA/16805/2023

Indane LPG Distributors Association, West Bengal

-Vs-

Indian Oil Corporation Ltd. & Ors.

For the Petitioner: Mr. Kalyan Bandopadhyay, Sr. Adv.,
Mr. Niladri Bhattacharjee,
Mr. Sirsanya Bandopadhyay,
Mr. Soham Bandopadhyay,
Ms. Deblina Chattaraj,
Mr. Aditya Chaturvedi,
Ms. Angana Dutta.

For the IOCL: Mr. Joydip Kar, Sr. Adv.,
Mr. Amit Kumar Nag,
Ms. Sudeshna Majumder,
Mr. Partha Banerjee.

Hearing concluded on: 6 September, 2023.

Judgment on: 29 September, 2023.

BIBEK CHAUDHURI, J. : –

1. These three writ petitions on similar facts were heard analogously and this Court delivers the following common judgment on conclusion of hearing.

2. The petitioners are an associations of the distributors of Indane LPG cylinders in the State of West Bengal. The members of the said associations disclosed their grievances against the alleged arbitrary actions of the respondents with regard to the Expression of Interest (EOI) floated for the existing distributors of Indane LPG cylinders for own load transportation in vertical position on unit rate basis attached to the proposed packed transportation tender 2023-2028 by the respondents.

3. It is ascertained from the writ petitions that the Indane Oil Corporation has sought for Expression of Interest (EOI) to obtain the willingness of the distributors of Indane LPG cylinders as to whether they engaged their own packed trucks for uplifting their own loads from the bottling plants at Budge Budge to vertical position of their place of business/godown on per unit rate basis before floating of tender. Along with the EOI is annexed a copy of the proposed tender to be floated by IOCL for five years commencing from 2023-2028.

4. Main grievance of the petitioners are that the expression of interest does not disclose any base rate of transportation of packed LPG cylinders, thereby causing the distributors handicapped and dependent upon the

sweet will or whim and caprice of the IOCL. The distributors shall have no right to state anything about the rate of transportation per unit and they are only dependent upon the final decision taken in tender process with regard to the rate fixed between the IOCL and the private transporters. The petitioners are mainly aggrieved of Clauses 9, 10 and 11. Clauses 9, 10 and 11 of EOI is reproduced below:-

“9. The finalized L-1 rates of proposed Public Tender for the General Transporters for the respective truck category shall be made applicable for LPG Distributors offering Packed Truck/s through this EOI process. The LPG Distributors shall not have right to question the L-1 rates arrived in the General Transporter tender.

10. In the event LPG Distributor withdraws the EOI during or after finalization of tender or refuse to accept L-1 rates arrived in General Tender, then his EMD shall be forfeited and the distributor will be disqualified from participating in existing tender. During the contract period of General Tender the LPG Distributor will not be allowed to induct any Packed Truck/s to uplift his own load.

11. Transportation rate escalation/de-escalation- refer proposed Tender Document.”

5. It is contended on behalf of the petitioners are that the respondents do not have any reason not to disclose any base rate in the EOI which is absolutely necessary for the distributors to take decision as to whether it would be viable for them to engage their own transportation for the purpose of transportation of LPG cylinders. It is also the case of the petitioners are that the EOI is absolutely silent on the question as to

whether various parameters of settlement of rate like current working data, methodology for establishing transportation rates, estimations for assessing the income and liabilities, labour costs, fare wages, DA increments provided by the central government, fuel costs, geographical locations and varying costs are to be taken into consideration. The EOI does not contain such methodology for fixing per unit rate to be paid to the distributors for their own transportation. The petitioners admit that on the question of fixing of value of the tender, the High Court hardly has any role to play except for striking down such action of the executive if proved to be arbitrary and unreasonable. In the instant case the action on the part of the IOCL is violative of Article 14, 19(1)(g) and 21 of the Constitution of India.

6. With the above pleadings the petitioners have prayed for the following reliefs:-

“(a) A writ of and/or in the nature of Mandamus do issue directing the respondent, their men agents, servants, assignees to cancel/rescind and revoke the Expressions of Interest floated for the existing distributors of Indane LPG cylinders for own load transportation in vertical position or unit rate basis attached to the proposed packed transportation tender 2023-2028 by the respondents;

(b) A writ of and/or in the nature of Mandamus do issue directing respondents, their men, agents, servants, assignees restricting them to float the packed transportation tender 2023-2028 without having revoked and/or rescinding the present Expressions of Interest floated for the existing

distributors of Indane LPG cylinders for own load transportation tender 2023-2028 by the respondents;

(c) A writ of and/or in the nature of Certiorari do issue directing the respondents, their men, agents, servants, assignees to transmit all records pertaining to the instant case specifically those forming the basis of the terms and conditions introduced by the respondent to agree to accept the transportation rates which are L1 rates finalized through proposed public tender and finalized for supply point by the company and not question the L1 rates finalized through proposed public tender and finalized for supply point by the company and not question the L1 rates arrived in the said general transporter tender even before the actual tender if floated, to certify quash the same so that conscionable justice may be rendered.

(d) Rule Nise in terms of prayer (c) and (d);

(e) An order of stay of the tender process involving the Expressions of Interest floated for the existing distributors of Indane LPG cylinders for own load transportation in vertical position on unit rate basis attached to the proposed packed transportation tender 2023-2028 till the disposal of the writ petition;

(f) Ad interim order in terms of prayer(e)

(g) Costs.

(h) Any other order or orders and/or direction or directions as Your Lordships may deem fit and proper.”

7. The respondents have filed a written objection controverting all allegations made out by the petitioners in the writ petition. It is specifically pleaded by the respondents that they intend to float new

tender for transportation of Indane LPG cylinders in vertical position on unit rate basis ex-Budge Budge LPG bottling plant for supplies to the LPG distributors/customers for the period of five years along with terms and conditions. Before floating the said tender, the respondents issued Expression of Interest dated 21st June, 2023 for the existing Indane distributors intimating their intention to float the new tender for transportation of Indane LPG cylinders. Before floating the tender the respondents issued Expression of Interest for the distributors to ascertain as to whether the distributors are interested to engage their own packed trucks for uplifting their loads from the bottling plant at Budge Budge to the godown of the distributor. The entire process was absolutely required for the oil company because unless the respondents are ascertained about the number of trucks which can be obtained through EOI from the Indane distributors, they will not be in a position to ascertain the actual required number of trucks to be obtained from general tender. Therefore, they are not in a position to fix the floor rate for the proposed tender. It is also stated by the respondents that on earlier occasions they had issued similar EOIs from intending Indane distributors without quoting floor rates and the distributors expressed their interest. The respondents also stated that the instant writ petitions are not maintainable in its present form. The petitioners' associations have no locus standi to maintain the instant writ petitions. Moreover, the entire basis of the writ petitions is that no tender document had disclosed the subject EOI but the fact remains that the tender documents had been attached with the EOI. The

decision to obtain Expression of Interest upon the certain terms and conditions is based on policy guidelines of the respondents and the same is followed throughout the country. The EOI is not a tender but it is only an invitation to the Indane distributors to show their interest as to whether they would participate in the proposed tender or not. It is clearly mentioned in the EOI that the distributors who are unwilling to take part in the EOI, are entitled to take part in the tender process with the intending transporters. Therefore, EOI is only a process to obtain willingness of the distributors if they would transport packed LPG cylinders in the vertical position to the godown at the rate which will be fixed in tender process. It is also pleaded by the respondents that no EMD is payable for the subject EOI and as such there cannot be any penalty of forfeiture of EMD in case of withdrawal of offer by the Indane distributors from the proposed tender after participating in the subject EOI. If the distributors take part in the subject EOI they would be financially benefited as they can offer their trucks on relaxed criteria of having no preferential age. This is a special privilege granted to the distributors only. Since the EOI is not even an offer, far less a concluded contract or agreement, writ court has no jurisdiction to issue any prerogative writ against the respondents.

8. By filing an affidavit-in-reply against the affidavit-in-opposition filed on behalf of the above named respondents the petitioners have reiterated their statement in the writ petitions. In the affidavit-in-reply, the petitioners once again have raised question of incorporating Clauses 9, 10

and 11 and declaration to annexure-1 and annexure-7 of the EOI. According to the petitioners, the said provisions are not only arbitrary or oppressive but also a blatant display of high heartedness of the respondents. It is further stated by the petitioners that in 2021 when a similar tender was floated by the respondents they discussed with the intending participants as regards the rates of tender, however the EOI of 2021 has not been executed as yet.

9. The contesting respondents have also filed a supplementary affidavit in order to bring on record that some of the LPG distributors submitted their offers in connection with the EOI dated 21st June, 2023 issued by the respondent No.1 for the existing Indane distributors intimating their function to float the new tender for transportation of LPG cylinder in vertical position on unit rate basis Ex-Budge Budge LPG bottling plant for supplies to the LPG distributors/customers for the period of five years. Pursuant to the order of the Hon'ble Division Bench the respondents upon receiving the offer in connection with EOI found that eight members of LPG distributors submitted their offers in e-procurement portal. The names of the distributors are stated in a separate annexure to the said supplementary affidavit.

10. The writ petitioners have also filed affidavit-in-opposition against the supplementary affidavit stated above. In the affidavit-in-opposition it is stated by the writ petitioners that it is an association of 937 LPG distributors engaged in the function of distribution of LPG backed cylinders from bottling plant throughout the state of West Bengal. Out of

the said 937 LPG distributors only eight distributors have taken part in the said EOI due to undue influence created by the respondent corporation upon the said distributors stating that in the event of not taking part in the said EOI within the stipulated period of time they will be barred by the respondent company to participate further in the Expression of Interest. So, they submitted their offer out of fear of being blacklisted by the respondent company in a new future.

11. These are all about the pleadings of the parties.

12. Mr. Kalyan Bandopadhyay, learned Senior Counsel on behalf of the writ petitioners is vehemently critical on Clauses 9, 10 and 11 of the EOI. At the risk of repetition this Court records that Clause 9 of the EOI states that the finalized L-1 rates of proposed Public Tender for the General Transporters for the respective truck category shall be made applicable for LPG Distributors offering Packed Truck/s through this EOI process. The LPG Distributors shall not have right to question the L-1 rates arrived in the General Transporter tender. It is submitted by Mr. Bandopadhyay that this clause is absolutely arbitrary and unjust and violative of Article 14 of the Constitution because of the fact that if L-1 rates are not acceptable to the distributors, they do not have any right to question the L-1 rates arrived in the general transporter tender. Again if L-1 rates arrived in the transporter tender is not acceptable to the distributors, they cannot participate in the tender process. In other words, it is submitted by Mr. Bandopadhyay that arbitrariness in Expression of Interest lies in the fact that the distributors do not have any right to question the rate

and the rate would be fixed in a process of tender where they would not have any right to agitate the base price of L-1 rate fixed in the tender between IOCL and general transporters.

13. Referring to Clause 10 of EOI it is submitted by Mr. Bandopadhyay that in the event LPG distributor withdraws the EOI during or after finalization of tender or refuse to accept L-1 rates arrived in General Tender, then his EMD shall be forfeited and the distributor will be disqualified from participating in existing tender. Thus, the distributors who are not in a position to accept L-1 rate fixed in a tender process where they are not allowed to take part, will be disqualified for participating in existing tender only because they offer their willingness in respect of Expression of Interest. The learned Senior Counsel on behalf of the petitioners has raised a question as to whether an offer in respect of this type of agreement such as in our hand can be made without disclosing consideration. Thus, the distributors are forced to accept L-1 rate which may be unjust or mala fide to them without raising any question as to the rate. Fate of the distributors will depend upon the escalation/de-escalation of the transportation rate settled in the tender between IOCL and the general transporters. It is also submitted by Mr. Bandopadhyay on behalf of the petitioners that the distributors would be black listed in case of breach of any condition of tender document which they do not know as on this date. The said clause and the proposed undertaking appearing at page-8 of the EOI is unfair, unjust and mala fide. Therefore, the EOI should be directed to be cancelled and revoked

and for such purpose issuance of writ of mandamus is absolutely necessary in the instant case. In support of his argument Mr. Bandopadhyay refers to a decision of the Hon'ble Supreme Court in the case of **Akhil Bharatiya Soshit Karamchari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Association vs. Union of India & Ors.** reported in **(1981) 1 SCC 246** and leads me to paragraph 62 of the said report in order to establish that the instant writ petitions are maintainable in its present form. In the said report the respondent, Union of India raised a technical point that the petitioner No.1 is an unrecognized association and, therefore, the petitioner to that extent, is not sustainable. Rejecting such contention it is held by the Hon'ble Supreme Court that whether the petitioners belong to a recognized union or not, the fact remains that a large body of persons with a common grievance exists and they have approached the Supreme Court under Article 32 of the Constitution. The Supreme Court further held, our current processual jurisprudence is not of individualistic Anglo-Indian mould. It is broad-based and people-oriented, and envisions access to justice through 'class actions', 'public interest litigation' and 'representative proceedings'. Indeed, little Indians in large numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmative of participative justice in our democracy. We have no hesitation in holding that the narrow concept of 'cause of action' and 'person aggrieved' and individual litigation is becoming obsolescent in some jurisdictions.

14. It is submitted by Mr. Bandopadhyay that the petitioners' associations representatives 937 members of distributors throughout the state of West Bengal. The association is represented by one Bijan Behari Biswas as the authorized signatory on behalf of the association duly recommended by the governing body of the association by a resolution. Therefore, the petitioners' associations is represented by the said Bijan Behari Biswas. In view of such circumstances, there cannot be any objection with regard to maintainability of the instant writ petitions. Same view is taken by the Division Bench of **Mini Bus Operators Co-ordination Committee & Ors. vs. State of West Bengal & Ors.** reported in **(1987) 2 CHN 276**. In paragraph 48 of the aforesaid report it is held by the Division Bench of this Court placing reliance on **D.S Nakara vs. Union of India, (1983) 1 SCC 305, S.P Gupta vs. Union of India, (1981) SCC Supp 87 and Bandhua Muti Marcha vs. Union of India, (1984) 3 SCC 161** that any citizen can espouse the cause of public remedy. Therefore, an application under Article 226 of the Constitution filed by a registered association under the West Bengal Societies Registration Act and being represented by an authorized member delegated to the cause of the distributors of LPG cylinders in the state of West Bengal can very well maintain the writ petition.

15. In this context, Mr. Bandopadhyay specially refers to paragraph 49 of the above mentioned judgment supplied by the Division Bench of this Court:-

“The orthodox idea of locus standi has taken a radical change on the basis of the Supreme Court determinations as above amongst others and even in spite of the representative character of the said Association if we uphold the submissions of the answering respondents on the point, that would not be fair, but the same would be too narrow and not in keeping with the recent trend of the judgments. So, we hold that the writ petition so also the appeal as taken by the said Association and their members and associates would be maintainable and thus the submissions on locus standi as advanced by the answering respondents, cannot be accepted.”

16. On the same point Mr. Bandopadhyay refers to another decision of the Hon’ble Supreme Court in **M.S Jayaraj vs. Commissioner of Excise, Kerala & Ors.** reported in **(2000) 7 SCC 552.**

“14. In the light of the expanded concept of the locus standi and also in view of the finding of the Division Bench of the High Court that the order of the Excise Commissioner was passed in violation of law, we do not wish to nip the motion out solely on the ground of locus standi. If the Excise Commissioner has no authority to permit a liquor shop owner to move out of the range (for which auction was held) and have his business in another range it would be improper to allow such an order to remain alive and operative on the sole ground that the person who filed the writ petition has strictly no locus standi. So we proceed to consider the contentions on merits.”

17. The learned Senior Counsel on behalf of the petitioners next place reliance on **Tata Cellular vs. Union of India** reported in **(1994) 6 SCC 651** to submit that in respect of government contracts and tender, State action must be in consonance with Article 14 of the Constitution. The principle of judicial review would apply to the exercise of contractual

powers by government bodies in order to prevent arbitrariness or favoritism. However, there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down. Coming to the instant case, it is submitted by Mr. Bandopadhyay that the LPG distributors are invited to agree on the Expression of Interest without providing any information as to the base rate of which the Expression of Interest may be asked. It is decided by the respondents that the rate of transportation of LPG cylinders from the bottling plant to the vertical point of the distributor's godown will be considered in the tender which will be floated for general transporters. In the tender process the distributors are excluded. However, they are under obligation to give consent on the Expression of Interest without having any say in respect of transportation charges. According to Mr. Bandopadhyay, the impugned EOI is arbitrary, unjust, mala fide and in clear violation of Article 14 of the Constitution on this aspect of the matter.

18. Mr. Bandopadhyay also submits that where the contractual dispute has to be a law element, the power of judicial review under Article 226 of the Constitution may be invoked. It is now trite that by way of writ petition under Article 226 of the Constitution, only public law remedy can be invoked. As far as contractual dispute is concerned, that is outside the power of judicial review under Article 226, with the sole exception in those cases where such a contractual dispute has a public law element. Mr. Bandopadhyay submits that the law on this point is crystallized in **Joshi Technologies International INC vs. Union of India & Ors.** reported in **(2015) 7 SCC 728**. It is held in paragraph 69 of the said report that there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court, which under certain circumstances, can refuse to exercise. It also follows that in the following cases the court would not normally exercise such discretion:

“69.1. The Court may not examine the issue unless the action has some public law character attached to it.

69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

69.4. Money claims *per se* particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.”

The Hon’ble Supreme Court further held in paragraph 70 of the aforesaid judgment:-

“70. Further legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to the contracts entered into by the State/public Authority with private parties, can be summarized as under:

70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations.

70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, Involving examination and cross- examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases court can direct the aggrieved party to resort to alternate remedy of civil suit etc.

70.4. Writ jurisdiction of High Court under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no

justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the license if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business.

70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

70.7 Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

70.8. If the contract between private party and the State/instrumentality and/or agency of State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitutional of India and invoking its extraordinary jurisdiction.

70.9. The distinction between public law and private law element in the contract with State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract. This Court has maintained the position that writ petition is not maintainable. Dichotomy between public law and private law, rights and remedies would depend on the factual matrix of each case and the distinction between public law remedies and private law, field cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the

contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.

70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

70.11. The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes.”

19. Referring to another decision of the Hon’ble Supreme Court in **Reliance Energy Ltd. & Anr. vs. Maharashtra State Road Development Corpn. Ltd. & Ors.** reported in **(2007) 8 SCC 1**, it is submitted by Bandopadhyay that one of the basic facets of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act, or decision would be unconstitutional. When Expression of Interest is invited, the terms and conditions must indicate with legal certainty, norms and benchmarks.

This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field". The distributors did not know the nature and the variables of the tender such as, current working date, methodology for establishing transportation rates, estimations for assessing the income and liabilities, labour costs, fare wages, DA increments provided by the Central Government, fuel costs, geographical locations and varying costs that are required to be taken into consideration for finalization of the rate. The distributors are also not allowed to have any say in the tender process in which only the respondents and general transporters will be present. In such circumstances, EOI fails the test of reasonableness and accordingly, is in violation of Article 14 of the Constitution.

20. Mr. Joydip Kar, learned Senior Counsel on behalf of the respondents first submits that the instant writ petitions are not maintainable under the provision of Section 19 of West Bengal Societies Registration Act, 1961. Section 19(1) clearly states that every society may sue or may be sued in the name of the President, the Secretary, or any office-bearer authorized by the Governing Body in this behalf. The instant writ petitions were filed by the society which is not a juristic person and therefore has no right to sue. In support of his contention Mr. Kar refers to a decision of the Division Bench of this Court in **12, I.C. Bose Road Tenants' Association vs. Collector of Howrah & Ors.** reported in **1977 CHN 965**. The association challenged a declaration under Section 6 of the

Land Acquisition Act, 1894 which was preceded by a notification under Section 4 of the said Act. In the said appeal, the respondents raised the issue of locus standi of the association to maintain a writ petition in the name of the association. The Division Bench decided the aforesaid issue as hereunder:

“We may first of all consider the locus standi of the appellant to maintain a writ petition. After the notification under Section 4 was published on December 2, 1974, the tenants of the said premises formed themselves into an Association which is the appellant before us. The appellant has been registered under the West Bengal Societies Registration Act, 1961 and its registered office is at 12, I. C. Bose Road Howrah. Article 226 provides for remedy for the infringement of a fundamental or legal right of a person. The condition precedent to the granting of any relief under Article 226 is the existence of a fundamental or legal right of a person and the infringement of such right. The right which is the foundation of an application under Article 226 is a personal and individual right. The legal right may be a statutory right or a right recognised by the law. The principles of law in this regard have been recently restated by the Supreme Court in *Mani Subrat Jain v. State of Haryana*, AIR 1977 SC 276. In that case, the Supreme Court has observed that it is elementary that no one can ask for a mandamus without a legal right. There must be a judicially enforceable right as a legally protected right before one suffering a legal grievance can ask for a mandamus. A person can be said to be aggrieved only when a person is denied a legal right by some one who has a legal duty to do something or to abstain from doing something. In the instant case, the persons who will be affected by the acquisition of the lands comprised in the said premises are the tenants occupying the same besides the owner thereof, but surely not the appellant. The appellant has no legal right and therefore there is no question of the infringement of a legal right. The appellant has no interest in the land and premises sought to be acquired and is not,

therefore, a person aggrieved. The learned Judge has rightly 'held that the appellant has no locus standi.'

21. It is submitted by Mr. Kar that the appellant being a registered society under the West Bengal Societies Registration Act, 1961 may sue or may be sued in the name of the President, the Secretary, or any office-bearer authorized by the Governing Body in this behalf as contemplated in Section 19(1) of the West Bengal Societies Registration Act, 1961. The instant writ petitions are filed by the association represented by one Bijan Behari Biswas. On publication of Expression of Interest the petitioners' associations cannot be said to be aggrieved. The distributors may or may not be aggrieved. Their legal rights may or may not be infringed by publication of Expression of Interest. In that case the distributors or any one of them in any representative capacity may file the writ petitions. The associations cannot maintain the writ petitions in the manner and form in which it is filed. On the same point Mr. Kar refers to **Illachi Devi (dead) by Lrs. & Ors. vs. Jain Society, Protection of Orphans India & Ors.** reported in **(2003) 8 SCC 413**. In paragraph 21 of the aforesaid report it is clearly observed by the Hon'ble Supreme Court that a society registered under the Societies Registration Act is not a body corporate as is the case in respect of a company registered under the Companies Act. In that view of the matter, a Society registered under the Societies Registration Act is not a juristic person. The law for the purpose of grant of a probate or Letter of Administration recognises only a juristic person and not mere conglomeration of persons or a body which does not have any statutory

recognition as a juristic person. He referred to another decision of this Court in **National Council of YMCA's of India vs. Skippers Textiles Private Limited** reported in **2009 SCC OnLine Cal 909**. In this report also the decision of **Illachi Devi** (supra) was followed and it was held that a society under the Societies Registration Act is not a juristic person. A company, on the other hand is a juristic person by virtue of being a body corporate whereas the society though registered does not possess this characteristic. Section 19 of the West Bengal Societies Registration Act, 1961 also specifically provides for suits and proceedings by and against the society being maintained in the name of its President, Secretary or any office bearer authorized by the governing body.

22. Mr. Kar, learned Advocate on behalf of the respondents refers to a Five Judges Bench decision of the Hon'ble Supreme Court in the case of **Tata Engineering And Locomotive Company Limited vs. State Of Bihar And Ors.** reported in **AIR 1965 SC 40**, that even in case of a juristic person like company or corporation fundamental rights protected under Article 19 of the Constitution cannot be said to be infringed. The Hon'ble Supreme Court observed, "it is no doubt suggested by the petitioners that though Article 19 is confined to citizens, the Constitution-makers may have thought that in dealing with the claims of corporations to invoke the provisions of Article 19, courts would act upon the doctrine of lifting the veil and would not treat the attempts of the corporations in that behalf as falling outside Article 19." The concept of "lifting of the veil" comes into play when fundamental right of any number of company

starting from the directors to shareholders in infringed. In such case duty is cast upon the court to lift the corporate veil to find out the victims of denial of fundamental and legal rights and it should offer appropriate relief to the individual concerned.

23. Mr. Kar next attacks the writ petitions on merit. It is submitted by him that the petitioners have prayed for issuance of writ of mandamus directing the respondents, their men, agents, servants, assignees to cancel/rescined and revoke the Expression of Interest floated for the existing distributors of Indane LPG cylinders for own load transportation in vertical position on unit rate basis attached to the proposed packed transportation tender 2023-2028 by the respondents. In the alternative, the petitioners have prayed for issuance of writ in the nature of mandamus directing the respondents, their men, agents, servants, assignees restricting them to float the packed transportation tender 2023-2028 without having revoked and/or rescinding the present Expressions of Interest floated for the existing distributors of Indane LPG cylinders for own load transportation in vertical position on unit rate basis attached to the proposed packed transportation tender 2023-2028. It is submitted by Mr. Kar that both the above mentioned prayers cannot stand together. If the writ petitioners pray for cancellation and/or revocation of EOI they cannot at the same time pray for restricting the respondents to float packed transportation tender 2023-2028. It is submitted by Mr. Kar that EOI was published qua distributors only to ascertain the number of trucks the distributors can provide for transportation of packed LPG

cylinders. Only when the oil corporation comes to know the number of trucks that may be used for transportation by the distributors, the corporation will be able to float the tender for the remaining numbers of trucks to be taken from the general transporters. However, it is decided that the L-1 rate that will be fixed in the tender will be applicable to all. After EOI if the corporation finds shortfall in the number of trucks, then only the corporation shall open the tender. In any case, the distributors' right of transport will not be affected because if a distributor wishes not to give consent to Expression of Interest he is entitled to take part in the tender as a general transporter.

24. It is submitted by Mr. Kar that if EOI appears to be mala fide to the distributors they have the option to stay away from the EOI and to participate in general tender. It is also submitted by the learned Advocate for the IOCL that if the distributors give willingness in the EOI, the distributors will get certain advantages and benefits, as for example, in case of the distributors the age of the truck will not be taken into consideration. Therefore, if a vehicle crosses the limit of years for which the truck was entitled to carry goods, such limit will be relaxed for distributor's transportation. Secondly, they are entitled to get relief from payment of EMD etc. Therefore, the distributors will get lot of benefits if they express their willingness in the EOI.

25. It is also contended by Mr. Kar that it is not possible for the IOCL to fix the base price as of now. From the case of the petitioners it is ascertained that per unit basis rate in respect of LPG cylinders depends

upon number of variables. Therefore, it is not possible to quote L-1 rate before conclusion of tender process. Mr. Kar also refers to page numbers 160-166 which are the letters written by individual distributors to the IOCL praying for extension of date to participate in EOI. It is submitted by him that by issuing such letters the individual distributors have waived their right to challenge EOI by filing the instant writ petitions.

26. It is also submitted by Mr. Kar that a copy of the tender document is annexed with the EOI. Clause-VII specifically speaks about the mode and manner how the rates are to be quoted. Therefore, the petitioners had fair idea about the rate.

27. It is submitted by Mr. Kar, the learned Senior Counsel on behalf of the respondents that as on the date when the writ petitions are moved the cause of action and right to sue do not survive in favour of the petitioners. The period within which the EOI was directed to be submitted and the revised date of tender have already expired. Therefore, beyond the date of submission of EOI, right to express willingness of EOI does not survive and the distributors should not have held to accept EOI, and they can now apply as transporters to take part in tender. Referring to the provisions of Section 4 and Section 6 of the Indian Contract Act, it is submitted by Mr. Kar that the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. The communication of an acceptance is complete, as against the proposer, when it is put in a course of transmission to him so as to be out of the power of the acceptor as against the acceptor, when it comes to the

knowledge of the proposer. The communication of a revocation is complete, as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it and as against the person to whom it is made, when it comes to his knowledge. Under Sub-Section 2 of Section 6, a proposal is revoked by the lapse of time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance. In the instant case the proposal of EOI has been revoked by the lapse of time prescribed in such proposal for its acceptance and accordingly cause of action to file the instant writ petition does not survive. Mr. Kar also argues that power of judicial review under Article 226 of the Constitution is limited and the court cannot direct the proposer to include the price clause. The court also cannot direct the IOCL to extend the time for submission of EOI. A writ court can issue a writ of mandamus only when a fundamental or legal right of the petitioner is infringed. In the instant case no legal right of the petitioners are infringed and therefore there was no occasion for the petitioners to maintain the instant writ petitions.

28. Mr. Kar also submits that the decision of the Reliance Energy Limited (*supra*) is not applicable under the facts and circumstances of this case because in the said reported decision the petitioner was a company carrying on business and its right to carry on business was said to have been effected. In the instant case, the writ petitioners do not carry on any business of distributorship. It cannot take shelter under Article

19(1)(g) of the Constitution. It has no right to sue under Section 19 of the 1961 Act. Therefore, the petitioners cannot allege violation of any right, seeking judicial review. Article 19(1)(g) has no manner of application to the applicants. Consequently, Article 14 also has no manner of application.

29. Moreover, the said judgment relates to the validity of a tender agreement. In paragraph 38 of the said judgment it is held by the Hon'ble Supreme Court that when tender is invited, the terms and conditions must indicate with "legal certainty" norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field". It is contended by Mr. Kar that in the instant writ petitions tender document is not under challenge. There was no concluded contract between the distributors and IOCL. A tender is in the nature of "an offer" or "a proposal" within the meaning of Section 2(a) of the Contract Act. The expression of interest (EOI) is not even an offer but invitation to offer. Therefore, no legal relationship between the distributor and IOCL is established when an expression of interest is floated.

30. Mr. Kar also submits that the decision of **Rishi Kiran Logistics Private Limited** (supra) is not applicable under the facts and circumstances of this case because it is held by the Hon'ble Supreme Court that where a case for damages lies, the parties should be relegated to civil court and judicial review should not be exercised. It is contended

by Mr. Kar placing reliance to the above observation of the judgment in paragraph 37 that Expression of Interest is in the realm of private law remedy. The appropriate remedy of the distributors in the facts and circumstances of the case lies in filing a suit for injunction against IOCL. Mr. Kar also argues that the ratio decidendi in Tata Cellular (supra) deals with the terms “of a tender” and it is held that the terms of tender is not open to judicial review. Similarly, the terms of Expression of Interest is also not open to judicial review. It is for the distributors either to accept the terms or not. The decision of the distributors does not give rise to a cause of action to approach this Court for relief as prayed by the petitioners.

31. Mr. Kar also argues that the decision of the Hon’ble Supreme Court in Joshi Technologies International INC (supra) is also distinguishable on facts. By a writ of mandamus, benefits under the Income Tax Act were sought in variation of a concluded contract. The Hon’ble Supreme Court on due consideration of the scope of judicial review held in paragraph 70.11 – The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resorting to remedies provided for adjudication of purely contractual disputes. Ultimately the appeal filed by Joshi Technologies was dismissed. It is also submitted by Mr. Kar that the precedent laid down in Tata Cellular (supra) clearly spells out that “terms of a tender is not open to judicial review.” The respondents also relies upon the ratio of Tata

Cellular and submits that the terms of Expression of Interest is also open to judicial review. It is the prerogative of the Oil Corporation as to on what terms the Expression of Interest would be called. The distributors or anyone of them may or may not accept the terms of EOI but it certainly does not give a cause of action to the association of distributors to approach this Court in the writ petitions.

32. Having heard the learned Senior Counsel on behalf of the petitioners' associations and the respondent/IOCL, I would like to deal with at the outset the issue regarding maintainability of these instant writ petitions. It is not in dispute that the petitioners are an association of LPG distributors, registered under the Societies Registration Act. Section 19(1) of the West Bengal Societies Registration Act empowers the President, the Secretary or any office bearer authorized by the Governing Body to sue or be sued. Such authorization is absolutely clear and clarified. On plain reading of the statute, it emerges that except the above mentioned three categories of persons nobody can maintain any legal proceeding in the name of or on behalf of the association. It is on record that the Governing Body of the association authorized one Bijan Behari Biswas to file the instant writ petitions. The said resolution of the Governing Body is on record. But the fact remains that the said Bijan Behari Biswas is neither the president, nor the Secretary nor office-bearer of the Governing Body of the petitioners' associations. Therefore, he is not entitled to represent the association. This Court is not inclined to be hypertechnical to accept an objection that the cause title of the writ petitions ought to have been in

the name of the President, or the Secretary or any officer-bearer authorized by the Governing Body representing the association. If on the other hand, the writ petitions were filed in the name of the association represented by the President or the Secretary or the office-bearer of the Governing Body, there might not have been any statutory short coming. However, indisputably Bijan Behari Biswas is not an office-bearer of the Governing Body of the petitioners' associations. Therefore, statutorily the said Bijan Behari Biswas cannot maintain and represent the petitioners' associations in the instant writ petitions. Mr. Bandopadhyay vehemently argues that the law relating to locus has seen been changed and developed from the days when the Division Bench passed the judgment in **12, I.C. Bose Road Tenants' Association** (supra). Though on principle on legal right infringed is of the nature of right in personam, the writ petition can be filed even by a person for infringement of the legal or fundamental right of a group of persons or body of persons or a large number of persons.

33. Thus, the orthodox idea of locus standi has taken a radical change on the basis of various decisions by the Hon'ble Supreme Court and even in spite of representative character of the petitioners' associations, if the instant writ petitions are dismissed on technical ground of maintainability, it would not only be unfair but the grievance of the distributors on merit shall remain unnecessary.

34. In **Akhil Bharatiya Soshit Karamchari Sangh** (supra) the Supreme Court held that whether the petitioner belongs to a recognized union or

not, the fact remains that a large body of persons with a common grievance exists and they have approached the Supreme Court under Article 32 of the Constitution. The Supreme Court held that our current processual jurisprudence is not of individualistic Anglo-Indian mould. It is broad-based and people-oriented, and envisions access of justice through 'class actions', 'public interest litigation' and 'representative proceedings'.

35. It is of course true that infringement of fundamental or legal right can be canvassed through class actions, public interest litigation and representative proceedings, but if a statute provides the mode and manner as to how the representative proceeding would be filed in court and by whom it would be filed, the concerned persons can only maintain the proceeding under Article 226 of the Constitution on behalf of an association representing large number of persons. In the instant case, the petitioners' associations have not been represented by the President or the Secretary or any office-bearer of the Governing Body. Therefore, statutory requirement of Section 19(1) of the West Bengal Societies Registration Act has not been complied with.

36. On merit, the first question that is left for the adjudication is the nature of the Expression of Interest. According to the learned Advocate for the respondents the Expression of Interest is not an offer, but invitation to offer.

37. The difference between offer and invitation to offer is very basic and lies mainly in the intention of the parties. While an offer directly allows the other party to enter into a contract, that is, a legally binding

agreement as soon as it is accepted, an invitation to offer mainly invites the other party to make negotiations and himself make an offer to the person who invites to offer. This might sound complicated, but it is a very fundamental difference that we see very often in our day to day lives. As for example when we go to a shop, the mere display of the articles in the shop is an invitation to offer by the seller to the general public. Anyone passing by the shop can choose to come to buy one of such articles displayed or may choose otherwise. Here, no one is legally bound to perform any action. Similarly, most forms of advertisements are not actually offers but invitations to offer. To fully grasp the difference I may say that in an invitation to offer, no specific party has the intention to enter into a contract. The seller may enter into a contract with anybody from the public who makes the best offer to him. So, the essence of an invitation to offer is that the offer is actually made by the seller. It is for the buyer to make a offer that is good enough and when the seller accepts it, it becomes a contract.

38. Coming to the instant case it is urged by the IOCL that EOI is not an offer but an invitation to offer. The distributors may or may not accept the invitation. If any of the distributors accepts the invitation and offers his willingness, the IOCL would accept such offer. In that case, there shall be a concluded contract and if such contract is made, the distributors will get certain benefits, such as, there would not be any preference of age of the trucks offered by them for carrying packed LPG cylinders and they would be free from paying EMD.

39. Learned Counsel on behalf of the petitioner on the other hand submits that EOI has an offer to the distributors by IOCL to accept the same without having no idea about the unit rate of carriage of packed LPG cylinders from the bottling plant to the respective godown of the distributors. They do not have any scope to bargain as the distributors are required to accept the EOI blindly. They will have to depend on the rate that will be fixed in general tender. It will be floated by IOCL for the general transporters.

40. There lies the arbitrariness because general transporters will have the opportunity to offer their rate while taking part in the bid but the distributors will not be allowed to offer their bid. This is the root of unequal treatment by the respondent oil company with the distributors.

41. A copy of Expression of Interest for transportation of Indane LPG cylinders in vertical position on unit rate basis Ex-Budge Budge LPG bottling plant under West Bengal State Office is issued by the IOCL for the purpose of obtaining consent from the interested LPG distributors for engaging their own packed trucks for uplifting their own cylinders. The EOI contains detailed terms and conditions. It is contended on behalf of the IOCL that the EOI is an invitation to offer. This Court has already discussed the salient differences between offer and invitation to offer. In case of invitation to offer, the promisor has the initial right of bargaining. In case of invitation to offer the person who accepts the invitation is said to be the offeror, or, as the term used in the Indian Contract Act, promisor. If the EOI is held to be an invitation to offer or invitation to

proposal, the offeror or the promisor must have the right to propose the terms and conditions of the offer as well as the consideration for the proposed agreement. The IOCL would be then the acceptor or the offeree or the promisee. In such a case at the desire of the distributor/promisor, the promisee would have to accept the proposal or abstain from accepting the proposal.

42. In the instant case no such right is left open the distributors. In terms of Clause 9 of the EOI the distributors cannot take part in finalization of L-1 rate. Secondly, in terms of Clause 10, distributors once signify acceptance of EOI, he would be debarred from withdrawing his assent. In case the distributors or anyone of them withdraws, his EMD will be forfeited. The distributors will have no say also in the matter of transportation rate escalation/de-escalation and the rate will be finalized only through tenders between IOCL and general transporters. Thus, the distributors do not have any right to signify to IOCL their counter offer. In such view of the matter the subject EOI is not an invitation to an offer but it is the offer or proposal within the meaning of Section 2(a) of the Contract Act without providing any right to the promisee to make any counter offer.

43. Therefore, I am not in a position to accept the argument advanced by Mr. Kar that the subject EOI is an invitation to offer. On the contrary, in my merited consideration, the EOI is an offer to the distributors to signify their assent and to state the number of vehicles each one of the distributors would be able to provide for transportation of packed LPG

cylinder from the bottling plant to their respective godown. As soon as a distributor accepts EOI, it binds him and agreement is said to be executed. It is needless to say that such an agreement is absolutely void because of the fact that an agreement without consideration is not enforceable by law and an agreement not enforceable by law is said to be void. (See Section 2(g) and 2(h) of the Indian Contract Act). Consideration of an agreement cannot be based upon a consideration that will be arrived at in future on the basis of another agreement, through tender in which the distributors would not be a party.

44. The Hon'ble Supreme Court in Tata Cellular (supra) had the occasion to deal with the scope of judicial review of a tender which is an offer. In respect of EOI the same principle on the question of the scope of judicial review is applicable. The Hon'ble Supreme Court has delineated the essential requisites of a valid tender:-

- i) It must be unconditional.
- ii) Must be made at the proper place.
- iii) Must conform to the terms of obligation.
- iv) Must be made at the proper time.
- v) Must be made in the proper form.
- vi) The person by whom tender is made must be able and willing to perform his obligations.
- vii) There must be reasonable opportunity for inspection.
- viii) It must be made to the proper person.
- ix) It must be of full amount.

45. The Hon'ble Supreme Court held that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favoritism. It is further held, "Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justifiable and the need to remedy any unfairness. Such an unfairness is set right by judicial review."

46. In the instant case the distributors are called upon to accept the EOI as per the terms and conditions unilaterally framed by the oil company. The oil company has not prescribed any rate for carriage of packed LPG cylinders by the distributors. According to the oil company the distributors will either accept the EOI or take part in the tender process with the general transporters and in such case they will not be allowed to enjoy any relaxation that is offered in the EOI.

47. It appears to this Court that the oil company has adopted carrot and stick policy to bind the distributor to execute an agreement without consideration at praesenti.

48. This Court has already discussed the legal principles on the subject and the decisions of the Hon'ble Supreme Court as well and this Court also cited the arguments made by the learned Counsels for the parties. Further discussion of the subject with reference to the decisions cited on behalf of both the parties will be an exercise in repetition and this Court refrains from repeating the same argument.

49. In view of the above discussion this Court comes to the conclusion that the EOI is an offer without specifying any consideration. Distributors were not permitted to offer any rate along with EOI and they are bound by the L-1 rate which will be determined in future in course of tender between IOCL and general transporters. Therefore, even if the distributors accept the proposal it will not be a binding contract because of the fact that a contract without consideration is void *ab initio*. Therefore, the proposed EOI is bad in law and is liable to be quashed.

50. However, having arrived at the above conclusion I am not in a position to grant any relief to the petitioner association in view of the statutory bar contained in Section 19(1) of the West Bengal Societies Registration Act, 1961. The writ petitions are not maintainable in the present form as the Associations registered under the W.B Societies Registration Act, 1961 cannot sue or be sued on its' own names and they are to be represented by the President, or the Secretary or any of the

officer bearers in the meeting of the Governing Body of the Associations. In the instant case the associations are represented by one Bijan Behari Biswas who is neither a President, nor a Secretary nor an officer bearer of the Associations. Thus Section 19(1) of the West Bengal Societies Registration Act, 1961 has not been complied with and therefore framing of the writ petitions de hors the statutory provision of the said Act.

51. Accordingly, the above noted writ petitions are dismissed, being not maintainable in its present form.

(Bibek Chaudhuri, J.)